Supreme Court of the United States

OCTOBER TERM, 1946

No. 1225

JOHN J. CASALE, INC.,
Petitioner,

vs.

LOREN SKIDMORE, et al.,
Respondents.

JOHN J. CASALE, INC.,
Petitioner,

vs.

JOSEPH MOONEY, et al.,
Respondents.

REPLY BRIEF IN BEHALF OF PETITIONER FOR CERTIORARI

CHARLES E. COTTERILL,
70 East 45th Street,
New York City,
Attorney for Petitioner.

INDEX

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Counsel for the respondents take these two positions: (1) they say that while it is true, as petitioner contends, that an employee cannot have been engaged in interstate commerce if his employer was not, yet, in the present case, the petitioning employer must have been engaged in interstate commerce because, although the two courts below said it was not so engaged, its employees nevertheless were,

and (2) each of the suing employees was shown by evidence to have been engaged *each week* in a substantial amount of interstate commerce. Taking those positions as to the asserted facts of record (neither of which did the courts below sustain) the contention now is that there is no question of national public importance nor any question of conflicts of decisions between appellate United States courts warranting certiorari.

I.

Engagement in Interstate Commerce.

Respondents' counsel agree that even in the *Kirschbaum* decision itself it was observed by this Court that if suing employees were engaged in interstate commerce so too to that extent must have been their employer. As a corollary it naturally follows that if the employer itself was *not* engaged in interstate commerce then no one of its employees *could* have been. The 5th Circuit Court of Appeals so holds in terms. In the present case the 2nd Circuit Court of Appeals holds directly to the contrary. Its view is that in the present case the employer itself was *not* engaged in interstate commerce but that its employees *were* and it simply ignored the conflict between its own view of the possibility of such a situation and the directly contrary view of the 5th Circuit Court of Appeals as to its impossibility.

Counsel for the respondents here do not escape the difficulty in the way they endeavor. All their emphasis is upon the contention that in the case of *Boutell* v. *Walling* the holding of this Court was that the work of the employees of one company consisting of mechanical labor upon truck vehicles of common carrier motor trucking companies, would be interstate commerce when those common carrier trucking companies are themselves interstate carriers. But here the petitioning company and its employees

were not engaged in any business or labor consisting of the servicing of property for any public carriers or other "instrumentalities of commerce". Here, as in the *Callus* decision of this Court, the property involved was *owned* by the petitioner who, as the lessor, elected to assure the keeping up of its capital value and the usefulness of the leased property by doing its own repair work through its own employees. In the *Callus* case the property involved was an office building much of the space of which was used by lessees in the conduct of their own interstate commerce. The owner of the building and its employees ran the elevators, furnished the lights, cleaned the offices and kept them in repair, supplied watchman service, etc., etc. This Court held that neither the building owner nor its employees who so serviced the interstate users of the leased building were engaged in interstate commerce. Here, in the present case, the property involved is not real but personal. The petitioning owner leased it out to others under long-term written leases. In its own interest and behalf, and as a part of its lease obligation, the petitioner kept the leased property in good and useful condition. That personalty, consisting of motor trucks was not used by the petitioner or by any public carriers or any other "instrumentalities of commerce". It was used only by numerous private lessee business houses who operated the vehicles themselves in making the respective deliveries of their own finished goods —chiefly in New York City.

It appears of record that among the numerous employees engaged by the petitioner two were known as "trouble shooters". As distinguished from all the other of the company mechanics, washers, etc. it was their duty to leave the premises of the plaintiff and go out wherever their employer's truck on the highways may have been in distress and in need of temporary road repair. Those needs did include temporary repair work of that sort by them in New Jersey enough to be "substantial" in relation to their division of time. But they would still be doing their work upon their own employer's property and their own employer was

not engaged in interstate commerce. Besides, because of the activities of those two employees it could never be concluded that *all* the mechanics and all *other* employees of the petitioner whose entire work was in their employer's own places would cause them to have been engaged in interstate commerce.

II.

Division of Time.

Certiorari has also been asked by the petitioner upon the ground of a fundamental conflict of decision between three of the Circuit Courts of Appeal as to the kind and degree of proof needed to demonstrate convincingly that in the course of *each week* was each suing employee engaged in interstate commerce. In their brief counsel for the respondents seemingly accept the need for such evidence. But (they say) it was contained in the record. The 2nd Circuit Court of Appeals did not say so, nor did the District Court. The District Court appears to have supposed that the individual week would not be a unit under this statute. The 2nd Circuit Court of Appeals rightly assumed that the individual week *would* be the unit but held that it could be "inferred" that in each week each of the suing employees was, to a substantial extent, engaged in interstate commerce.

Appreciating the weakness of that position of the 2nd Circuit Court of Appeals, in opposition to the view of the other Circuit Court of Appeals, respondents' counsel go the extreme length of asserting to this Court that the record showed each of the suing employees each day or night *did* work upon each vehicle and that therefore each of such suing employees was proportionately as much engaged in interstate commerce each week as was the interstate use of the vehicles by the lessees.

This Court, is respectfully advised that on its face that is a physical impossibility. When twenty or more large motor trucks are in a given repair shop for major overhauls, each of which job takes from three to ten days, it is unwarranted for respondents' counsel to suggest that any evidence of record established that each of the mechanics in such repair shop in the course of each day and week worked upon each of the twenty trucks therein. Similarly in regard to greasing. The trucks are greased or not each day but in accordance with the mileage they have been run since the last greasing. If, in a given garage of the petitioner, there be stored each night 100 particular trucks and there are in that garage three or four greasers, it is preposterous to suggest that on this record is it shown that each of the three or four greasers each night greased *each* of the 100 trucks therein. It is equally absurd to suggest that in such a garage where those same 100 trucks were stored overnight would each of the five or six "washers" participate in the washing of *each* of those 100 vehicles. Not only does the record utterly fail to suggest any such extremity of circumstance but neither court below found the facts in that regard to be such as counsel for the respondents now belatedly assert.

Respectfully,

Charles E. Cotterill,
70 East 45th Street,
New York, N. Y.
Counsel for Petitioner.

Dated: April 26, 1947.